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IN THE

# Supreme Court of the United States

OCTOBER TERM 1955

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No. ———

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HARLAN BLACKBURN,

*Petitioner,*

vs

STATE OF FLORIDA,

*Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

---

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Harlan Blackburn, the petitioner herein, prays that a writ of certiorari be issued to review the final judgment and decree of the Supreme Court of the State of Florida entered in Case No. 26218 in that court, entitled, Harlan Blackburn, Appellant vs. State of Florida, Appellee, affirming the judgment and sentence of the Criminal Court of Record in and for Polk County, Florida rendered on January 4, 1954. The jury returned a

verdict of guilty under Counts 1, 2 and 3 of the five counts submitted to them. The trial judge, under the first count, which charged that petitioner did unlawfully set up, promote and conduct a lottery for money commonly known as Cuba and bolita, sentenced petitioner to be confined in the State prison of Florida at hard labor for a term of five (5) years which was the maximum provided by statute, and to pay one-ninth of the accrued costs, and in default of payment thereof to sixty (60) days at hard labor in the County Jail of Polk County, Florida. (R. Vol. IX, p. 1687)

## OPINIONS BELOW

The judgment and sentence of the Criminal Court of Record in and for Polk County, Florida, has not been published in any official or unofficial report, but appears in Volume IX, page 1687, of the Record.

The opinion of the Supreme Court of Florida appears in APPENDIX "A", page 21-26. and the denial of rehearing by the Supreme Court of Florida appears in Appendix "A", page 41, said opinion is reported in case of *Blackburn vs. State,* 83 So. 2d 694.

## JURISDICTION

The opinion, judgment and decree of the Supreme Court of Florida was rendered and entered on June 3, 1955. (Appendix "A", p. 21)

Timely application for rehearing was denied on November 1, 1955. (Appendix "A", p. 41)

On application of petitioner, the Chief Justice of the Supreme Court of Florida, on the 3rd day of November, 1955, granted a stay of mandate to enable petitioner to apply for a writ of certiorari to this Honorable Court, said stay being for 90 days. (Appendix "A", p. 49)

The jurisdiction of this court is invoked under *Title 28, United States Code, Section 1257 (3)*, which provides in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * * or statutes of * * * the United States."

The following cases are believed to sustain the jurisdiction of this court:

*New York ex rel Bryant v. Zimmerman*, 278 U. S. 63, 67, and cases cited;

*Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166, U. S. 226 at 231, 232.

The Supreme Court of the State of Florida is the highest court of the State.

## QUESTIONS PRESENTED FOR REVIEW

### Question No. 1

Does the due process clause of the Fourteenth Amendment to the Constitution of the United States protect petitioner from prosecution under a State court information in which each of five counts first charges five persons, including petitioner, with violation of a section of the Florida lottery statute, the charge concluding, "against the peace and dignity of the State of Florida;" and the same count next charges one or more other persons with a different violation of the same section, the charge concluding in the same fashion, and, the same count then charges one or more other persons with a different violation of the same section with the same conclusion, there being no allegation of conspiracy nor of concert of action nor participation by petitioner with respect to the different offenses and the different persons charged?

### Question No. 2

Did the Supreme Court of Florida, by its failure to reverse the judgment and sentence of the trial court because that court denied petitioner's motion and renewed motion for change of venue, thereby deny petitioner due process of law guaranteed to him by the Fourteenth Amendment to the United States Constitution thereby denying petitioner his right to be tried under a charge fairly made and fairly tried in a public tribunal free of prejudice, passion and excitement?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the Fourteenth Amendment, which, in part, provides:

> "* * * nor, shall any state deprive any person of life, liberty, or property, without due process of law." (Excerpt)
>
> *United States Constitution, Amendment XIV.*

The Florida lottery statute involved is: *Section 849.09, F. S., as amended by Chapter 26765, Section 1, Laws of Florida 1951, F. S. A. Sec. 849.09.* (Appendix "B", p. 51-53)

The Florida change of venue statute involved is: *Section 53.03, F. S A.*, which is made applicable to Criminal Courts of Record of Florida by *Section 911.02(2), F. S. A.* (Appendix "B", p. 54)

## STATEMENT OF THE CASE

When Harlan Blackburn, petitioner herein, was forced on trial with seven others in December, 1953, in the Criminal Court of Record in and for Polk County, Florida under the felony charges in a six count information naming twenty-four defendants, he had already been convicted in a trial in the same State court and had been sentenced on April 27, 1953 by the same judge under an information charging a conspiracy to commit the same felony (R. Vol. I, p. 36). His appeal from that conviction was then pending. (R. Vol. I, p. 16).

Harlan Blackburn had been the object of tremendous newspaper publicity relative to the transactions with which he was charged. Between October 10, 1951

and September 30, 1953 approximately ninety-seven different newspaper articles had been published about him in papers with wide circulation in Polk County, Florida. Ten of these articles called petitioner "Kingpin" or "Brains of Lottery Gang;" 12 named him as "Kingpin of Rackets;" 13 described him as "Notorious Kingpin of Gambling Rackets;" 9 called him "Orlando Racketeer;" 13 called him "Bolita Kingpin;" 6 called him "Head Man of Ring;" 3 called him "Boss of a Three-County Ring;" 3 the "Head of Operations;" and 3 others "Bolita Chieftain" and 2 called him "Gambling Overlord."

In addition to these, he was called "Ex-Convict," "Orlando No. 1 Badboy," "Boss of Gambling," "Kingpin of Orlando Bolita," "Bolita Big Shot," "Freewheeling Kingpin," "Prince of Big Bolita Province," "Orlando Gambler," "Bolita Celebrity," "Top Lottery Suspect," "Big Gun of Lottery Racket," "Top Level Suspect," and "Overlord of Bolita" at least once.

The verified venue motion alleged that the people of Polk County had been saturated with continuous sensational news articles picturing him as one of the most dangerous criminals preying upon the working people of Polk County through the operation of one of the most diabolical gangs infesting society, causing him to be looked upon generally by the people of Polk County as something loathsome and unholy and that a mountain of prejudice had been created in the minds of the people of Polk County against him, so that he had been rendered "so odious to the inhabitants of said Polk County that it would be a matter of impossibility for him to receive a fair and impartial trial in said county." (R. Vol. I, pp. 169, 171) (Three supporting affidavits, R. Vol. I, pp. 172-177).

This newspaper publicity appears in Exhibit "A" to Harlan Blackburn's motion for a change of venue (R. Vol. I, p. 166, separately certified).

Petitioner's motion also set up the fact that he and the charges against him had been made a political football in the race for sheriff of Polk County, and that a candidate generated and caused talk and gossip all over Polk County, although without basis in fact, that petitioner was friendly with one of the candidates for said office and that he was a dangerous criminal. That said charges became the subject of talks before some civic organizations. (R. Vol. I, pp. 167-168)

The prosecution did not deny the fact that petitioner had been rendered odious (R. Vol. I, pp. 178-181), the ground relied upon under the Florida statute, nor did the State traverse or deny any of the facts alleged and established, but the counter-affidavits submitted by the prosecution all denied the existence of a different ground for change of venue, not relied on and only denied (insofar as petitioner's motion was concerned) the conclusion drawn that it was a matter of impossibility for him to receive a fair and impartial trial in Polk County (R. Vol. I, p. 180).

Examination of the jurors on voir dire disclosed that a large number thereof had read of, and/or heard discussed, and/or had discussed the case or cases against petitioner. Twenty-six of said jurors were excused for having fixed opinions about petitioner's guilt or innocence in said cause. *(R. Vol. II, pp. 210, 231-2, 233, 235, 238, 239, 281, 296, 304, 305, 306, 320, 322, 328, 348, 352, 354, 356, 399, 409, 410, 411, 413, 414, and 417).*

After petitioner exhausted his peremptory challenges, and six jurors were in the box, petitioner duly renewed his motion for change of venue and the court denied said renewal (R. Vol. III, p. 439).

The six jurors finally forced upon Petitioner to try said cause were, (1) Mr. Kirkland, who had heard the case discussed in the last two days prior to his examination on voir dire (R. *Vol. II, pp. 387, 395);* (2) Mr. Rahrar, who had both read of the case and heard it discussed (R. *Vol. II, p. 360);* (3) Mr. Bissitt, who had both read of the case and heard it discussed (R. *Vol. II, p. 418);* (4) Mr. Hilton, who had read of the case (R. *Vol. II, p. 415);* (5) Mr. Mercer, who had read of and heard the case discussed (R. *Vol. II, p. 419)* and (6) Mr. Gay, who had read of and heard the case discussed (R. *Vol. II, p. 417).*

The record contains some 1767 pages of pleadings, motions, arguments, evidence, objections to evidence, charges to the jury, etc. The only question presented to this Court involving any factual matters is the one on change of venue. With that exception, we have not attempted to condense any factual matters adduced in the court below.

## FEDERAL QUESTIONS IN THE COURTS BELOW

### A. In The Trial Court

Petitioner filed a motion to quash the information setting up, among other things, the misjoinder of both offenses and parties defendant (R. Vol. I, pp. 14-28 at 26).

The protection of the Fourteenth Amendment is expressly invoked in ground 31 of the motion for new trial which reads as follows:

> "31. Because this defendant was denied a fair and impartial trial, as guaranteed by Sections 11 & 12 of the Bill of Rights to the Florida Constitution, as well as due process as guaranteed and protected by the Fourteenth Amendment of the Federal Constitution, through and by denial of Motion for Change of Venue, as well as denial of Motion for Severance and also by the admission in evidence of an enormous mass of incompetent, hearsay testimony, as well as through the forcing of this defendant to trial under a dragnet information charging separate, independent offenses at the same time and with other persons also charged with separate, independent offenses." (R. Vol. IX, p. 1654).

It is to be noted that this ground invokes federal protection, both as to the motion for change of venue, the motion for severance and the motion to quash.

Ground 40 of the motion for new trial invokes the protection of the Fourteenth Amendment as against the denial of petitioner's renewed motion for change of venue:

> "40. It became and was apparent that it was impossible to secure a jury who had not read or heard discussed, and talked about the case against this defendant, and this defendant having exhausted all of his peremptory challenges, the Court erred in overruling and denying defendant's renewed motion "For change of venue, and such ruling forced this defendant to trial under said conditions, denying to him a fair and impartial trial as guaranteed by Sections 11 & 12 of the Declaration of Rights under the Florida Constitution, as well as due process guaranteed to him by the Fourteenth Amendment to the Federal Constitution." (R. Vol. IX, p. 1657).

## B. In The Supreme Court of Florida

Petitioner continued to press the federal questions on appeal by his formal assignments of error. The pertinent assignments are:

> "1. The trial court erred in the entry of order overruling and denying motion for change of venue filed by defendant." (R. Vol. IX, p. 1721).
>
> "2. The trial court erred in overruling and denying motion of this defendant whereby he renewed his motion for change of venue after he had exhausted all of his peremptory challenges and before the jury was sworn." (R. Vol. IX, p. 1721).
>
> "5. The trial court erred in overruling and denying motion for severance filed by this defendant, respectively upon all of the grounds of said motion stated." (R. Vol. IX, p. 1722).

Assignment 34 reads as follows:

> "34. The trial court erred in overruling and denying motion for new trial filed by this defendant, respectively upon all of the grounds of said motion stated." (R. Vol. IX, pp. 1735, 1736).

That the Supreme Court of Florida passed upon all the federal questions raised is made clear by the last paragraph of the opinion. It reads:

> "We have considered all other assignments of error and are not persuaded that the trial court committed reversible error in entering the judgment and sentence appealed from." (Appendix "A", p. 26).

That the Supreme Court of Florida passed upon the Federal questions, here presented, is further evidenced by the fact that the petitioner filed in that court, and that court granted, an application for stay of mandate to enable petitioner to make this application to the court. Said application appears in Appendix "A", pages 43 through 47; and shows upon its face that it was based upon the asserted denial of petitioner's right to due process of law under the Fourteenth Amendment to the Federal Constitution, by virtue of the Supreme Court of Florida's and the trial court's refusal to quash the information against petitioner and said court's refusal to grant petitioner's motion for change of venue.

On timely application for rehearing, petitioner again invoked the protection of the Fourteenth Amendment. Paragraph 2 A of his petition reads:

> "2 A. The trial court's refusal to quash this omnibus shot-gun information because of the gross misjoinder of parties defendant and offenses therein contained, as well as this court's opinion affirming and upholding said order and conviction violates this petitioner's rights to a fair and impartial trial as guaranteed by Section 12 and due process as guaranteed by Section 12, and the guaranty that a person charged with crime shall be advised of the nature and cause of the accusation against him by Section 11 of the Declaration of Rights of the Florida Constitution, and likewise denies this petitioner due process and equal protection as guaranteed by the Fourteenth Amendment to the Federal Constitution." (R. Vol. X, pp. 1782-1783).

Paragraph 2 C reads:

> "2 C. That said information, the trial court's refusal to quash the same. and this court's opinion "affirming this petitioner's conviction on said in-

formation denies to this petitioner due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the Federal Constitution." (R. Vol. X, pp. 1784-1785).

Paragraph 3 C reads:

"3 C. That the trial court's failure to grant this appellant's application for change of venue and this court's opinion affirming and upholding the trial court's action in so doing and affirming this appellant's conviction without a change of venue, denied this petitioner the right to a fair and impartial trial as guaranteed to him by Section 12 of the Declaration of Rights of the Florida Constitution, as well as denied this petitioner due process of law and equal protection of law as guaranteed to him by the Fourteenth Amendment to the Federal Constitution as well as denying this petitioner the rights and privileges and immunities guaranteed to him by the Fourteenth Amendment to the Federal Constitution." (R. Vol. X, p. 1786).

The Supreme Court of Florida entered order denying petition for rehearing as follows:

"Counsel for Appellant having filed in this cause Petition for Rehearing and having been considered, it is ordered by the Court that said Petition be and the same is hereby denied." (Appendix "A", p. 41).

## REASONS FOR GRANTING THE WRIT

### As To Question 1

It is clear that the Supreme Court of Florida has decided federal questions. The last paragraph of its opinion expressly states this fact in these words:

"We have considered all other assignments of error and are not persuaded that the trial court committed reversible error in entering the judgment and sentence appealed from."

The information in this case is startling. We have not been able to find a similar charge in any reported decision. We have never before encountered a similar charging document. It presents a question of national importance which has never been decided by this court.

Let us consider Count 1 under which petitioner was sentenced. (R. Vol. I, pp. 1-2). This count charges that petitioner and 4 others set up and promoted and conducted a lottery *in 5 counties*. It then concludes, "contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida." The count then charges one Duskin with a similar violation of the same statute *in 4 counties* without any allegation of conspiracy nor of concert of action nor participation by petitioner with Duskin in his charge; the charge against Duskin concludes in the same words that concluded the charge against petitioner just quoted. The count next charges one Geraldine Berry with a similar violation *in 2 counties* without any allegation of conspiracy nor of concert of action nor participation by petitioner. This charge concludes with the same language.

Count 2 of said information, upon which petitioner was also convicted, follows the same pattern set by Count 1 and contains four distinct and separately concluded charges of violations of the lottery law; each of such four separate charges being concluded as above described, with no allegation of conspiracy nor of concert of action nor participation by petitioner with Dus-

kin, the individual next charged, nor with the 16 other persons next charged, nor with the 2 persons finally charged in said count.

Each of the remaining counts submitted to the jury follows the same pattern and presents the same sort of misjoinder of parties defendant and offenses.

Such an information does not fairly charge this petitioner. As held in the case of *United States v. McConnell,* 285 F. 164 text, 166, there is no authority under the law for joining in one charging document, even in separate counts, charges against different persons, in the absence of "a partnership in criminal purposes," and the court "must look, not to what may be the evidence to support the charge in the indictment, (information) but to the charge itself, and see whether it sets out what Mr. Justice Holmes in *United States v. Kissel,* 218 U. S. 601, aptly terms, 'partnership in criminal purposes.' "

The closest analogy to the instant information we have been able to find in any charging document is found in the first six counts in the case of *State v. Monfred,* et al, 183 Md. 305, 37 A(2d) 913, where Monfred and Caltrider were indicted for violating the statute forbidding the sale and other use of obscene publications. The court said:

> "* * * The first six counts charge that on November 19, 1943, the defendants (1) each unlawfully did sell, (2) each unlawfully did lend, (3) each unlawfully did give away and offer to give away, (4) each unlawfully did show, (5) each unlawfully did have in his possession, and (6) each unlawfully did bring and cause to be brought into the State of Maryland with, intent to sell and exhibit, certain publications alleged to be obscene. * * *"

The court held, as to each of said counts, that the inference from the use of such language is "that each individually committed the offense without concert of action," and that each of those counts charged each defendant, "individually, with a violation of the statute entirely separate and distinct from the offense committed by the other."

The Maryland court cites the *McConnell* case, supra, and like the *McConnell* case, holds that if it appears from the face of the charging document there is a misjoinder of defendants, then the indictment is subject to demurrer (in Florida, a motion to quash).

The instant information more patently charges separate offenses against different persons than the Monfred indictment because it not only concludes as to each group or person, "contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida;" but also because the charge against each individual or group next charged begins with the words, "and that;" and also because each group or individual charged subsequent to petitioner, but in the same count, are alleged to have committed their distinct and separate offenses in various and different numbers of counties.

See also the case of *State v. Nelson,* 8 N. H. Rep. 163, in which the court cites four English cases and one Massachusetts case which we consider to be relative to the same question. The case of *Houchins v. State,* 154 Fla. 277, 17 So(2d) 82, held a charging document fatally defective for misjoinder of offenses, *even in the face of proof that the accused was not actually prejudiced by such misjoinder.*

Philip Lino, named as defendant in the third charge of Count 2 and the second charge of Count 3, was tried with petitioner and convicted (R. Vol. IX, p. 1644).

Agnes Hester Brundidge named in the third charge of Count 2, the second charge of Count 3 and the third charge of Count 4, tried with petitioner, was found guilty (R. Vol. IX, p. 1644).

The underlying philosophy of all the above cases and the due process clause of the Federal Constitution seems to us to be that a fair and impartial trial cannot be had where it is permitted to put the accused on trial when charged in the same document with distinct and separate offenses, or when charged with different individuals with whom he is not charged to be acting in concert, conspiracy or participation.

Even Rule 8 of the Federal Rules of Criminal Procedure, which greatly liberalized pleadings in respect to this question, would not, we believe, permit the instant information to be used against an accused.

### As to Question No. 2

The question of whether or not the Fourteenth Amendment to the Federal Constitution protects an accused, in a State court, from trial by newspapers, by requiring the State court to grant a change of venue upon proper application and showing, is one of National scope, vitally affecting the entire Nation, and is one which this court has never expressly decided.

The adverse newspaper campaign to which petitioner was subjected, as shown by Exhibit "A" to the motion for change of venue, is not even disputed and is proven beyond all doubt. That campaign and the talk and gossip generated by it and the sheriff's race, rendered this petitioner odious to the people of Polk County. The prosecution at no place denied that petitioner had been rendered odious. Being odious in that county, the conclusion necessarily follows he could not receive a fair and impartial trial by a jury of that county. The prosecution denied the conclusion but did not deny the facts.

The fact that twenty-six of the jurors were excused because of fixed opinions bolsters the conclusion that petitioner had been rendered odious. Those twenty-six in effect, admitted that the Press campagin had fixed their verdict. The six jurors who tried petitioner did not make this admission but all six of them admitted they had come in contact in one way or another with the vast amount of adverse publicity petitioner had received.

It is impossible to see how anyone who had been subjected to the out-of-court campaign to convict the petitioner, as reflected by Exhibit "A" to his motion for change of venue, could be said to be neutral and impartial between petitioner on the one hand, and the State of Florida on the other hand.

Measured against the case of *Sunderland v. United States,* 19 F(2d) 202, the petitioner could not possibly have received a fair trial. This conclusion seems inescapable under the authority of Mr. Justice Jackson's concurring opinion, joined in by Mr. Justice Frankfurter, in the case of *Shepherd v. State of Florida,* 71 S.

Ct. Rep. 549, wherein it was pointed out that prejudicial influences from outside the courtroom were becoming all too typical of highly publicized trials, and that it rendered a trial but a legal gesture to register the verdict already dictated by the Press and the public opinion which it generated.

See also the cases of *Blackwell v. State,* 76 Fla. 124, 79 So. 731, *Johnson v. State,* 112 Fla. 189, 150 So. 278, and the case of *Juelich v. United States,* 214 F(2d) 950, decided by the Fifth Circuit Court of Appeals on August 12, 1954.

When unsworn, and highly prejudical facts, or purported facts, such as contained in the articles included in Exhibit "A", which include even purported statements of the facts and evidence by witnesses, are brought to the jurors' attention before they take the oath as jurors and when the defendant has no right to cross-examine the alleged makers of such reports, *the defendant is effectively and actually deprived of the right not only to a trial before a fair and impartial jury, but of the right to confront the witnesses against him and the right to cross-examine the same.*

No ordinary man can escape or diminish the power of the Press to fix a reputation for him in the public mind. The Press can make a crusader look like a criminal, a patriot appear to be a traitor and a great man seem to be a demagogue. By stress, slant and focus the Press can make childlike scientists appear to be dangerous risks and a great genius seem simple-minded. When the Press tries, the Press convicts. Where the Press campaign is local, the only hope for the ordinary individual is to have his trial transferred to a place free from the clamor and prosecution of the Press.

## CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for writ of certiorari should be granted.

CRAMPTON HARRIS

1018-19 First National Building,
Birmingham 3, Alabama.

PAT WHITAKER,

308 Tampa Street,
Tampa, Florida

TOM WHITAKER,

308 Tampa Street,
Tampa, Florida

MARK R. HAWES,

308 Tampa Street,
Tampa, Florida

*Counsel for Petitioner*

## PROOF OF SERVICE

I hereby certify that I have mailed, by United States Airmail, postage prepaid, a copy of the foregoing petition to Honorable Richard W. Ervin, Attorney General of the State of Florida, to his office in Tallahassee, Florida, on this the —— day of January, 1956.

*Attorney for Petitioner*